



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J]

CRIMINAL CASE NO. 14 OF 2017

REPUBLIC.....PROSECUTOR

-versus-

1. ANTHONY OOKO NYAUNDA

2. DANIEL ODHIAMBO ORWA

3. PHILEMON ABICH

4. ERICK OMONDI OTIENO.....ACCUSED

JUDGMENT

1. The accused persons herein, **Anthony Ooko Nyaunda, Daniel Odhiambo Orwa, Philemon Abich and Erick Omondi Otieno** were charged with the murder of one **Alphonse Ouma Miguye** (hereinafter referred to as '**the deceased**'). The particulars of the information were that the accused persons '*on 03/07/2017 at Arombe village within Migori County in the Republic of Kenya caused the unlawful death of the deceased.*'

2. The accused persons denied the information and were tried.

3. The prosecution called seven witnesses in support of its case. The Area Chief of Suna Lower Location one **Paul Yogo Tumbo** testified as **PW1**. The wife of the deceased testified as **PW2**. She was **Quinter Auma**. **Jennifer Arua** testified as **PW3**. She was a sister to the deceased. A daughter to the deceased one **Christine Atieno** testified as **PW4**. **Dr. Awinda Victor Omolloh** who conducted the post mortem examination on the deceased's body testified as **PW5** whereas **No. 91830 PC Nahashon Akumu** was attached to Migori Police Station and accompanied the investigating officer to the scene of crime. He testified as **PW6**. The Investigating Officer **No. 23405 Insp. Niconary Ongoya** testified as **PW7**. I will henceforth refer to the witnesses in the numerical sequence they testified before Court.

4. The second accused person herein, **Daniel Odhiambo Orwa**, died in the course of the trial. The case against him was terminated. The trial was therefore largely held for the remaining three accused persons.

5. The prosecution's case was relatively straight forward. It was alleged that the deceased was a victim of clan brutality. Several witnesses testified on an aspect of the Luo practice on the death of a clan member. The clan converges under the leadership of its Chairman to *inter alia* prepare for the send-off of the dead member. Each male member of the clan is then required to pay a certain amount of money towards the funeral expenses. A member who does not oblige faces the wrath of the clan. Preliminarily, the goods of such a member are confiscated and sold to offset the amount payable.

6. **Meshack Okello Migoe** (hereinafter referred to as '**Mzee Meshack**') was an elderly man. He hailed from the same clan with the accused persons and the deceased. He passed on sometimes in June 2017. As is the practice, the clan met and resolved among many other issues, that each male member to contribute Kshs. 1,000/= to cater for the funeral expenses. Women from the clan who were married elsewhere were to contribute Kshs. 500/= each.

7. The deceased made an initial contribution of Kshs. 400/=. He was however not keen to clear the balance of Kshs. 600/= as he posited that he had no more money. The clan then decided to attach the property of the deceased to offset the balance. A team of some clan members was sent to the home of the deceased to carry out the mission. The home of the deceased was within the larger homestead of Mzee Meshack. The clan held its meetings at the home of Mzee Meshack.

8. The mission was carried out on 03/07/2017. It was during the said mission that a confrontation occurred. The deceased resisted and put up a fight. The team raised alarm. Other clan members who were at the nearby home of Mzee Meshack swiftly responded to the call and ran to the home of the deceased. On learning what the deceased was upto, the clan members visited upon the deceased and thoroughly chastised him.

9. The deceased's hands were tied and he was escorted to the office of PW1. It was the first accused person herein, **Anthony Ooko Nyaunda**, who called and informed PW1 of what had happened to the deceased. PW1 eventually received the delegation and urged for peace. He reminded the deceased the need to cooperate with the rest of the clan members. The group was thereafter released. They all returned to the home of Mzee Meshack and continued with their meeting.

10. The deceased seemed to have been injured in the fracas. On the following day the deceased was taken to Oruba Nursing & Maternity Home where he underwent treatment. He unfortunately passed on in the process.

11. PW2 reported the matter to the police immediately the deceased died. It was PW7 who was assigned the duty to investigate the matter. He visited the scene and recovered two sticks which were allegedly used in beating the deceased. PW7 also recorded statements from witnesses and witnessed a post mortem examination conducted by PW5 at the Oruba Nursing & Maternity Home on 07/07/2017. PW5 opined that the cause of death of the deceased was severe head injury due to assault.

12. On 05/07/2017 PW1 caused the arrest of the 4 accused persons herein whom he personally escorted to Migori Police Station. The accused persons were placed in custody.

13. PW7 analyzed the evidence and formed an opinion that the accused persons be charged with the murder of the deceased. He forwarded the matter to the Office of the Director of Public Prosecution. The prosecutor concurred with PW7. The accused persons were then escorted to Migori County Referral Hospital for mental assessment. They were presented before Court and formally charged on 24/07/2018.

14. At the close of the prosecution's case the three accused persons were placed on their respective defences. They all gave unsworn statements and variously denied taking part in the death of the deceased. No witness was called and they all closed their respective cases.

15. The Defence Counsel **Miss. Okota** thereafter filed written submissions. The State relied on the evidence on record.

16. It is on the foregone evidence that this Court is called upon to render this judgment. I have carefully considered the evidence on record as well as the exhibits. As the accused persons are charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will consider each of the ingredients separately.

17. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by all the prosecution witnesses save PW6. The first limb is hence answered in the affirmative.

18. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which he personally filled after conducting the post mortem examination. PW5 opined the possible cause of death of the deceased to have been severe head open head injury due to assault. There was a comminuted fracture of the skull. The brain matter had herniated as well. As there was no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

19. I will now turn to the second ingredient; that is to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons or any of them.

20. PW1 did not witness how the deceased died. Likewise, PW2 testified that none of the accused persons went to the home of the deceased as they had lost their father and were mourning at their homestead. PW3 also did not know how the deceased died.

21. There was nevertheless an eye-witness account on how the deceased died. It was by PW4. PW4 was a daughter of the deceased aged 12 years. She gave an unsworn testimony after a *voir dire* examination was conducted. PW4 testified that the deceased did not ail but was instead beaten by many clan members. She recalled seeing the first accused person with one **Nyamala** as among the people who assaulted the deceased. She saw the first accused person hitting the deceased with stones and a stick.

22. Given that the accused persons have denied the information, this Court is under a legal duty to weigh the evidence of PW4 who is the only identifying witness with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence on recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under: -

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

23. It was also held in Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

24. In R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

25. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR in upholding the evidence of recognition at night held as follows: -

On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...

26. Again the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

27. The evidence of a single witness must be corroborated to sustain a conviction. **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya vouches for such save in sexual offences. Corroboration is not limited to only eye-witnesses accounts. Corroboration may be by any other material evidence before Court.

28. I am alive that in certain instances a Court may even convict based on the uncorroborated evidence of a single identifying witness. The Court of Appeal of Uganda in Obwana & Others vs. Uganda (2009)2 EA 333 in dealing with the issue of conviction in the absence of corroboration presented itself thus:

.....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.

29. PW2 testified that the incident occurred at around 07:00pm. It was dark and she used a lantern lamp to see around. She further stated that the deceased was assaulted by clan members outside the house after they took away some items. By that time PW2 had been married by the deceased for around 6 months. She admitted that by then she had not known many of the clan members.

30. PW4 testified that she stood near the door and watched the first accused person who was among the other clan members assault the deceased. She did not testify on the distance between where she was and where the people fought. It was also not clear how PW4 managed to see with such alleged precision in the darkness.

31. The first accused person admitted that he was among the clan members who went to the house of the deceased to collect the items in lieu of payment. He stated that he entered the house and collected the items. The deceased charged at him while armed with a knife and the first accused person raised alarm. The other clan members who were with him restrained the deceased and rescued the first accused person. They also raised alarm that the deceased had instead attacked them. Many other clan members who were meeting in the homestead immediately responded and ran to the scene. A serious fight thereafter followed.

32. When the deceased who was armed was subdued and tied, it was the first accused person who called PW1 and sought his intervention. The basis of the request was that the deceased had turned violent and refused to cooperate with the rest of the clan members.

33. By placing the evidence of PW4 against that of PW2, PW3 and the first accused person's defence, it is unlikely that the unsworn evidence of PW4 yields any reliable probative value. The evidence of PW4 raises more questions than answers in the totality of the circumstances of the case. I do not find it safe to rely on such evidence.

34. I am therefore not satisfied that the second issue was proved. There was no sufficient evidence connecting any of the accused persons with the commission of the crime. The second issue is hereby answered in the negative.

35. With the foregone finding I find no persuasion in dealing with the last ingredient. The upshot is that the accused persons herein are found **NOT GUILTY** of the murder of **Alphonse Ouma Miguye**. Each of the accused persons is forthwith set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 6th day of February 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Miss Okota, Counsel for the Accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant